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NOTES.

THE TEST OF PUBLIC SERVICE JUSTIFYING STATE CONTROL.—Under the doctrine set forth in *Munn* v. *Illinois* (1876) 94 U. S. 113, that "when one devotes his property to a use in which the public has an interest, he in effect grants to the public an interest in that use, and must submit to be controlled by the public for the common good to the extent of the interest he has thus created," the duty of public service has been extended to a much larger sphere of business enterprises than was included in any prior conception of public service. See *People* v. *Budd* (1889) 117 N. Y. 1; *Nash* v. *Page* (1882) 80 Ky. 539; *Stock Exchange* v. *Board of Trade* (1889) 127 Ill. 153; *Cotting* v. *Kansas City, etc. Co.* (1897) 82 Fed. Rep. 839; *State of Mo.* v. *Telephone Co.* (1885) 23 Fed. Rep. 539. A recent Indiana case, declaring that a telegraph company, engaged in buying up stock quotations from a board of trade and selling them, is a public service company as regards such business, furnishes a typical illustration of this class of cases. *Western Union Telegraph Co.* v. *State ex rel. Elevator Co.* (Ind. 1905) 76 N. E. 100.

The doctrine of *Munn* v. *Illinois* has been severely criticised, *State ex rel.* v. *Associated Press* (1901) 159 Mo. 410, and the test as to what circumstances and conditions must exist to justify the courts in holding that property is devoted to public service, and subject to public control without leaving such decision open to the constitutional objection of taking property without due process, is exceedingly vague and unsatisfactory.

With respect to common carriers, innkeepers, farriers, and other similar undertakings, at common law, they were held to be public servants, because they held themselves out to serve the public indif-

ferently, *Gisbourn* v. *Hurst* (1710) 1 Salk. 249, and because the nature of the undertaking was such, by reason of monopolistic or other economic conditions, that the public must repose a great degree of trust in them, and there was great opportunity afforded for defrauding or oppressing the public. *Lane* v. *Cotton* (1701) 12 Mod. 473, 482, 484; *Coggs* v. *Bernard* (1704) 2 Ld. Raym. 909, 918; Doct. & Stud. Dial. 2 ch. 38; Co. Lit. vol. 3, 89 a, (6), (7); Jones, Bailments 103, 104. It was also held that when a person or corporation, undertaking to serve the public, was granted a legal monopoly, or other exclusive privilege, by the sovereign power, he was subject to public control, because of the public necessity created, *Bolt* v. *Stennett* (1800) 8 Term Rep. 606; *Anonymous* (1800) 8 Term Rep. 608, note; *Alnutt* v. *Inglis* (1810) 12 East 527; Lord Hale, *De Portibus Maris*, 1 Har. Tracts 77, 78; Lord Hale, *De Juris Maris*, id. 6, 7, but these cases would seem to form a distinct class by themselves, since, apart from any right of control because of the public necessity created, the public would undoubtedly have a right to control the enterprise because of the grant given.

Aside from the cases where there is a public grant, then, the rule to be deduced from the early common law decisions would seem to be that where there is a general holding out to serve the public under such monopolistic or other economic conditions as to create a public necessity, the business is affected with a public interest and subject to public control. The doctrine of *Munn* v. *Illinois* is, therefore, simply an application of this old rule to a new set of facts. See *Nash* v. *Page*, supra. Previous to *Munn* v. *Illinois*, this rule was repeatedly applied in the United States, but only to enterprises which were analagous to those held to be public at common law. *Dwight* v. *Brewster* (1822) 1 Pick. 50; *Messenger* v. *Railroad* (1873) 36 N. J. L. 407; *Buckland* v. *Adams Express Co.* (1867) 97 Mass. 124; *Busey & Co.* v. *Transportation Co.* (1872) 24 La. Ann. 165; *Pate* v. *Henry* (1833) 5 Stew. & P. 101.

The decision of *Munn* v. *Illinois* would seem to be authority for the proposition that this principle is alive and applicable to the new economic conditions which arise to-day, and that the duty of public service is not limited to those enterprises held to be public at common law and to those in which the public has an interest of a proprietary nature. An analogous tendency of the courts to extend a rule of law beyond previously established limits is found in the case of certain western States, where the granting of eminent domain to private irrigating or mining enterprises is justified on the ground that the peculiar economic and industrial conditions impress them with a public interest. See 6 COLUMBIA LAW REVIEW 46. Granting, then, that those facts and circumstances exist, which under this rule determine public service, the constitutional objection to the *Munn* v. *Illinois* decision would not seem to be valid, since an enterprise correctly held to be public, is *a fortiori* subject to public control. The owner, by undertaking to serve the public under the conditions which create public interest, must be deemed to have devoted his property to public use, so that it may be said that he,

himself, determines whether or not his business is to be public. In ascertaining whether the facts which determine public service to exist, general public welfare, alone, would not seem to be enough to create public interest, since the public welfare is, to some extent, bound up in all private enterprises, but, it seems that a business is not affected with the public interest, unless there is a holding out to serve the public under conditions so monopolistic as to make it possible for the owner to oppress the public with high prices and unjust discrimination. It must necessarily rest in the discretion of the courts to apply this rule only to cases where there is an actual public necessity created.

All the facts which determine public service seem to be present in the principal case, so that it is in accordance with correct principle, as well as established authority. See *Stock Exchange* v. *Board of Trade*, supra. The case is made additionally strong because of the fact that the business is carried on in close connection with, and by means of the telegraph business, which has long been recognized as a public service company. *Parks* v. *Telegraph Co.* (1859) 22 Cal. 423.

FORMER JEOPARDY IN THE CONVICTION OF A HIGHER OFFENSE ON NEW TRIAL.—It is universally held that a defendant, who procures a judgment of conviction to be set aside, may be tried anew for the same offense. The reason given is that the constitutional protection against being twice put in jeopardy may be waived, and that the defendant's action operates as a waiver. Bishop's New Criminal Law §§ 995, 998.

The Supreme Court of the United States, by a division of five to four, has recently held, where upon an indictment for a greater offense the jury finds the accused not guilty of that offense, but guilty of a lower one included in it, and upon an appeal by the defendant, the judgment is reversed and a new trial ordered, that he may be tried on the new trial for the greater offense set forth in the indictment, of which he was previously acquitted. *Trono* v. *United States* (1905) 26 Sup. Ct. Rep. 121. The new trial will proceed as if the verdict of acquittal never had been rendered. The prevailing opinion held that the judgment is entire and that on appeal by the defendant he cannot appeal from the judgment of conviction alone, but must be considered to appeal from the judgment of acquittal as well. It then applied the doctrine of waiver to this theory of the entirety of the judgment and concluded that the accused waives his defense of prior jeopardy as to the entire judgment. Mr. Justice Holmes concurs in the result without writing an opinion. His concurrence is probably upon the ground given in his dissenting opinion in *Kepner* v. *United States* (1903) 195 U. S. 100 and not upon the ground that the judgment is single. The case can, therefore, hardly be said to be authority for that proposition. It is clear that a defendant has not the slightest intention of appealing from a judgment of acquittal in his favor. The case must accordingly stand or fall with the proposition that the verdict is indivisible.